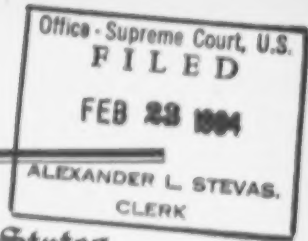


No. 83-1246



IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

LOUIS F. PEICK, *et al.*,
v. *Petitioners,*

PENSION BENEFIT GUARANTY CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT
PENSION BENEFIT GUARANTY CORPORATION
IN OPPOSITION

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<i>Carpenters Pension Trust for Southern California v. Shelter Framing Corp.</i> , pet. for cert. filed, 52 U.S.L.W. 3268 (Sept. 24, 1983) (No. 83-507)	2n
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<i>Pension Benefit Guaranty Corp. v. R.A. Gray & Co.</i> , prob. juris. noted, 52 U.S.L.W. 3308 (Oct. 17, 1983) (No. 83-245)	passim
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Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208-1311 (1980), amending the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829-1035 (1974)	1n

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1. The first Question Presented by the petition for certiorari ("Pet.") in this case—the constitutionality of the pre-enactment application of the Multiemployer Act¹—is identical to the issue before this Court in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, No. 83-245, and *Oregon-Washington Carpenters-Employers Pension Trust Fund v. R.A. Gray & Co.*, No. 83-291, as to which the Court noted probable jurisdiction on October 17, 1983, and which has been scheduled for argument in April

¹ The Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208-1311 (1980), amending Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. No. 93-406, 88 Stat. 829-1036 (1974), 29 U.S.C. §§ 1301-1481 (Supp. V 1981).

1984.² In light of the pendency of issues concerning the statute's pre-enactment application in *R.A. Gray*, the present petition should be held on the Court's docket until the appeals in Nos. 83-245 and 83-291 are decided.³

2. The first Question Presented also raises the constitutionality under the Due Process Clause of the post-enactment, or "prospective," application of the Multi-employer Act. There is, however, no conflict among the circuits on this constitutional question. Seventeen courts in addition to the court below have now sustained the prospective application of the statute against constitutional attack.⁴ No court has ruled to the contrary. In light of this uniform precedent, the issue of the statute's prospective application does not warrant this Court's attention.⁵

3. The second Question Presented by the petition—i.e., whether the Multiemployer Act violates the Takings Clause of the Fifth Amendment—does not merit review.

² The joint appendix and briefs for appellants in Nos. 83-245 and 83-291 were filed on December 12, 1983. The brief for appellee in both cases was filed on January 11, 1984.

³ On January 9, 1984, the Court of Appeals for the Second Circuit issued an opinion upholding the constitutionality of the Act's pre-enactment application. *Textile Workers Pension Fund v. Standard Dye & Finishing Co., Inc.*, No. 83-7004 (2d Cir., January 9, 1984).

⁴ In addition to the decision below, see the authorities cited in the Jurisdictional Statement of the Pension Benefit Guaranty Corporation (the "PBGC") in the *R.A. Gray* case, No. 83-245, pp. 14-15 and n.11, and in the PBGC's response (filed October 11, 1983) to petitioner's Motion to Defer in *Carpenters Pension Trust for Southern California v. Shelter Framing Corp.*, No. 83-507, p. 3 n.2. See also, *Dorn's Transportation, Inc. v. I.A.M. National Pension Fund*, No. 82-1141 (D.D.C., January 19, 1984).

⁵ Should the Court, however, wish to consider a case involving the constitutionality of the statute's prospective application, we agree that the present case is suitable for such consideration. The record is free of any factual disputes which have yet to be resolved through statutorily mandated arbitration procedures (29 U.S.C. § 1401 (Supp. V 1981)), and the issues have been thoroughly considered by the two lower courts.

Constitutional challenges to the Multiemployer Act based on the Takings Clause have been rejected by all other courts that have addressed this issue. *See, e.g., Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628, 642-43 (4th Cir. 1983); *Speckmann v. Paddock Chrysler Plymouth, Inc.*, 565 F. Supp. 469, 472-73 (E.D. Mo.), *appeal stayed*, No. 83-1881-EM (8th Cir., November 7, 1983); *Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. J.N. Ceazan*, 559 F. Supp. 1210, 1216 (N.D. Calif.), *appeal docketed*, No. 83-1095 (9th Cir., April 22, 1983).

For the foregoing reasons, the petition for a writ of certiorari should be held on this Court's docket to await decision in Nos. 83-245 and 83-291, and to be decided in conformity with this Court's ruling in Nos. 83-245 and 83-291. Certiorari on other issues should then be denied.

Respectfully submitted,

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